



Australian Government
Attorney-General's Department

Civil Law Division

PERSONAL PROPERTY SECURITIES BILL 2009
IMPLEMENTATION OF SENATE COMMITTEE'S
MARCH 2009 RECOMMENDATIONS

Recommendation 1

4.19 The committee strongly recommends that the Department reconsiders the balance between certainty of the law and the accessibility of the provisions with a view to:

- simplifying the language of the exposure draft bill—for example, wording provisions clearly and limiting them to deal only with common circumstances;
- simplifying the structure of the exposure draft bill—to minimise the cross-referencing needed;
- simplifying the terms used—for example instead of ‘tangible goods’ use the term ‘goods’ appropriately defined to ensure the full meaning needed for the reform is ascribed to the term; and
- using overseas provisions as often as possible to allow overseas experience to provide guidance for the Australian model.

Government response:

Accepted. The Government will review the structure and language of the Bill.

Implementation of response:

Attachments A and B summarize the changes made to the Exposure Draft before the Bill was introduced.

Recommendation 2

4.27 The committee recommends that the commencement date for the scheme be extended by at least 12 months to May 2011 for the committee's recommendations to be implemented and for advice from stakeholders to be taken into account before the content of the bill is finalised.

Government response:

Consider further. The Government will consider revising the timeframe for commencement of the PPS scheme in consultation with the States and Territories and, following these consultations, make an announcement about the timing of commencement.

Implementation of response:

On 2 July 2009, COAG agreed that the commencement date for the new PPS scheme should be May 2011, but that the legislative framework should be in place by the end of 2009 and the IT framework built by May 2010. In making its decision COAG acknowledged the importance of allowing an adequate transition time for businesses and consumers to accommodate this and other changes, including the global financial crisis.

Recommendation 3

4.35 The committee recommends that the bill include a requirement that the operation of the bill be reviewed three years after it commences in a process that includes extensive consultation with industry, governments, lawyers, consumers and academics.

Government response:

Accepted.

Implementation of response:

Clause 343 of the PPS Bill requires the Minister to instigate a review of the operation of the Bill, which must be completed within three years of the new PPS scheme commencing.

Recommendation 4

5.27 The committee recommends that the primary legislation for the personal property securities reform include the key privacy protections for individuals, including a prohibition on making the address details of any individual public.

Government response:

Accepted in substance. The Bill will be amended to clarify the information about individuals that may be included on the register and to better describe the key privacy protections provided to individuals. The Bill will make it clear that address details of individual grantors will not be included on the register. Accordingly, a prohibition on making address details public is not required.

Implementation of response:

Item 2 of the table in clause 153 of the PPS Bill provides that if the relevant collateral is consumer property and:

- it is required to be described by a serial number—no personal information is collected,
- it is not required to be described by a serial number—the only details that can be collected about the grantor are his or her name and date of birth.

Recommendation 5

5.33 The committee recommends that either:

- (a) a Privacy Impact Assessment be undertaken by a person or organisation that is independent from the government and who has experience in undertaking such assessments and the results of the assessment are made public, or
- (b) the Department's Privacy Impact Assessment is reviewed by a person or organisation that is independent from the government and who has experience in undertaking such assessments, and the results of the review are made public.

Government response:

Accepted. A Privacy Impact Assessment will be undertaken by an appropriately qualified independent person or organisation. The assessment will be published on the Department's website. Having regard to recommendation 4 of the minority report, this will occur within two months of the completion of the assessment.

Implementation of response:

On 13 July 2009, Information Integrity Solutions (IIS) provided the Department with its Privacy Impact Assessment Report for the Personal Property Securities Register. IIS is a specialist consultancy company which has provided services in the information privacy field since 2004. The report was published on the Department's website on 23 July 2009. A copy of the report is **Attachment C**.

Recommendation 6

5.34 The committee recommends that if any issues raised by the Office of the Privacy Commission in its submission are not considered as part of the Privacy Impact Assessment then these matters should be separately considered by the Attorney-General's Department and a response to the issue be provided to the Office of the Privacy Commission in writing or made public.

Government response:

Accepted. The Privacy Impact Assessment will consider all issues raised by the Office of the Privacy Commissioner in its submission to the Committee.

Implementation of response:

The Privacy Impact Assessment considered, amongst other things, 'the privacy issues the [Office of the Privacy Commission] raised in its submissions to AGD and the Senate Committee' (see page 8 of Attachment C).

Recommendation 7

5.44 The committee recommends retaining the requirement for rights and duties to be exercised honestly and in a commercially reasonable manner. The intended scope of these requirements should be explained in detail in the bill's explanatory memorandum.

5.45 The explanatory memorandum should particularly explain that the requirement to act in a commercially reasonable manner should not fetter or undermine the ability of parties with similar bargaining power to contractually agree about what constitutes commercially reasonable behaviour.

Government response:

Accepted. This Bill will be amended to make clear that the duty to act in a reasonably commercial manner applies only in relation to Chapter 4 of the Bill concerning the enforcement of security interests. The duty to act in a reasonably commercial manner will not apply to the extent that the parties have contracted out of the enforcement provisions of the Bill under section 154 of the Bill.

Implementation of response:

Clause 111, in Chapter 4 of the Bill concerning the enforcement of security interests, provides as follows:

111 Rights and duties to be exercised honestly and in a commercially reasonable manner

- (1) All rights, duties and obligations that arise under this Chapter must be exercised or discharged:
 - (a) honestly; and
 - (b) in a commercially reasonable manner.
- (2) A person does not act dishonestly merely because the person acts with actual knowledge of the interest of some other person.

Recommendation 8

5.55 The committee recommends that the bill adopt existing international personal property security conflict of laws provisions, such as the New Zealand conflict of laws model, unless there is a particular reason to depart from those provisions.

Government response:

Accepted. The Government accepts that the Bill should include conflict of laws provisions. The New Zealand conflict of laws provisions have been criticised as being uncertain. To avoid uncertainty in the Bill, the Government will include conflict of laws provisions in the Bill based on the provisions at Appendix A to the Department's submission to the Committee (the revised commentary to the Bill).

Implementation of response:

Part 7.2 of the Bill, entitled *Australian laws and those of other jurisdictions*, includes conflict of law provisions setting out which law, in court proceedings, will govern the validity, perfection and effect of perfection or non-perfection of a security interest. Clause 234(2) makes it clear that Part 7.2 does not affect the law that governs contractual obligations (including any obligations arising under a security agreement). The conflict of laws provisions are based on those applying in New Zealand recommended by the UNCITRAL Legislative Guide on Secured Transactions.

In general terms, Part 7.2:

- (a) allows the parties to a security agreement to agree that Australian law applies (subject to limited exceptions) (clause 237; PPSA (NZ) s26(1)(c));
- (b) applies Australian law to goods located in Australia (clause 238(1); PPSA (NZ) s26(1)(a); UNCITRAL recommendation 203);
- (c) applies the law of the location of the goods when the goods are located outside Australia (clause 238(2); UNCITRAL recommendation 203);
- (d) when goods are to be moved to another jurisdiction, applies the law of the destination jurisdiction (clause 238(2); PPSA (NZ) s26(1)(c); UNCITRAL recommendation 207);
- (e) when the goods are of a kind that normally moves between jurisdictions, applies the law of the location of the grantor (clause 238(3); PPSA (NZ) s30(b); UNCITRAL recommendation 204);
- (f) for intangible property, applies the law of the location of the grantor (clause 239(1), PPSA (NZ) s30(a); UNCITRAL recommendation 208);
- (g) for intellectual property and ADI accounts, applies the law that applies to the intellectual property (clause 239(2)) and the ADI account (clause 239 (4); UNCITRAL recommendation 210, Alternative B);
- (h) for financial property not perfected by possession or control, applies the law of the location of the grantor (clause 240(1); PPSA (NZ) s30(c));
- (i) for financial property located in Australia and perfected by possession or control, applies the law of Australia (clause 240(5); PPSA (NZ) s26(1)(a)); and
- (j) for proceeds, applies the law of the security interest in the collateral that gave rise to the proceeds (clause 241; UNCITRAL recommendation 215).

Recommendation 9

5.62 The committee recommends that the scope and content of the enforcement provisions of the exposure draft bill be reviewed by the Department with particular attention to ensuring that the provisions are comprehensive and adequate.

Government response:

Accepted. The Bill will be amended to provide enhanced sanctions for improper use of the register and to ensure the registrar can monitor and investigate suspicious register activity. Further consideration will be given to appropriate sanctions for misusing the register which may include civil and criminal penalties.

Implementation of response:

Part 6.3 of the PPS Bill establishes a regime for applying civil penalties under the Bill. On application by the PPS Registrar, the Federal Court can order the payment of a civil penalty for a serious breach of a civil penalty provision. The civil penalty provisions are:

- Applying to register, or failing to amend an existing registration, where the registrant does not have a reasonable belief that the collateral secures, or will secure, an obligation (clause 151).
- Searching the register other than for an authorised purpose (clause 172).

Under clause 172 of the Bill, the Registrar has the power to investigate a suspected search of the register other than for an authorised purpose.

Recommendation 10

5.70 The committee recommends that consideration be given to improving the priority of an unperfected lessor as against unsecured or other unperfected interests in the goods.

Government response:

Accepted. The Government will, in consultation with stakeholders, consider the appropriate priority outcomes for unperfected lessors as against unsecured or other unperfected interests.

Implementation of response:

The PPS Bill provides that a security interest includes the interest of a lessor of goods under a PPS lease (clause 12(3)(c)). An unperfected security interest in the leased goods will be enforceable against a third party (including an unsecured creditor—clause 20). On the grantor's external administration, an unperfected security interest will ordinarily vest in the grantor (clause 267(2)). However, an operating lease for a term of less than one year will not vest in the grantor on the grantor's external administration (clause 268(1)(b)). A lessor who wishes to assert their lease against a grantor who has entered external administration should perfect the lease by registration on the PPS register. The registration would put unsecured creditors on notice that property apparently owned by the grantor is in fact subject to a security interest and will not be available to meet the claims of unsecured creditors on the grantor's insolvency.

These provisions seek to balance the rights of lessors to claim leased goods on the grantor's external administration (through a registration), against the deception to unsecured creditors that the grantor has false wealth available to meet their claims that in reality is held under an undisclosed lease.

Recommendation 11

5.78 The committee recommends that the explanatory memorandum and the proposed education campaign adequately explain the purpose and effect of the draft intellectual property provisions, including disseminating the information to appropriately targeted international industries, organisations and stakeholders.

Government response:

Accepted.

Implementation of response:

Specific information on the application of the PPS Bill to intellectual property is contained in paragraphs 3.30–31 and 7.31–32 of the Explanatory Memorandum.

In the lead up to the commencement of the new PPS scheme in May 2011, the Government will produce information and educational material designed for different user groups. The needs of intellectual property stakeholders will be taken into account in developing this material.

Liberal Senators' Dissenting Report

Liberal Senators wholly support recommendations 1, 2, 3 and 10 of the majority report.

Liberal Senators support in principle the majority recommendations except recommendation 7 (in relation to the commercially reasonable manner test).

Recommendation 1

1.10 In relation to consultation and education Liberal senators recommend that:

- (a) the government uses the committee report and the Liberal senators' additional recommendations to undertake new consultation about the proposed reform;
- (b) the government should particularly identify stakeholders who are not yet engaged with the reform and educate them about the scope and significance of the proposals;
- (c) a considerably revised draft bill should be publicly released within six months of the date of this report;
- (d) stakeholders should be extensively educated and consulted about the revised exposure draft for three months from the release of the draft; and
- (e) a final exposure draft bill should be referred to the Senate within six months of the release of the revised draft bill requesting that the final exposure draft is referred to this committee for consideration accompanied by:
 - (i) the proposed draft regulations; and
 - (ii) a report that outlines the key concerns raised with the government by stakeholders and the government's response to those concerns and that identifies the differences between the newly referred bill and the November 2008 exposure draft bill.

Government response:

Accepted in part. The Government will carry out targeted consultation with stakeholders about changes to the Bill raised in the Committee's report. However, further examination of the revised Bill by the Committee would not be consistent with ensuring the final text of the Bill is settled in time to allow stakeholders an adequate period to prepare to transition to the new PPS system. In order to provide certainty to stakeholders, the Government will progress development of the PPS Bill with a view to its passage through Parliament by the end of 2009 and will develop the new PPS register so that its main functionality is complete by May 2010.

Implementation of response:

In revising the PPS Bill following the Committee's report, the Department has worked closely with the States and Territories and with members of the PPS Consultative Group.

As regards timing, see majority recommendation 2.

Recommendation 2

1.12 Liberal senators recommend that the government table a report in Parliament on the first year of operation of the reform within 15 months of the commencement of the Act. The report should include the views of stakeholders, including representatives of industry, governments, lawyers, consumers and academics and the government's response to these views.

Government response:

Not accepted. Reviewing the operation of the reform after only 12 months of operation would not provide useful data about the new PPS system. The Bill will be amended to require that the Government review the Bill after the new PPS system has been operating for three years.

Implementation of response:

Not applicable.

Recommendation 3

1.15 Liberal senators recommend that the Privacy Impact Assessment identify key privacy protections which should be contained in the primary legislation.

Government response:

Accepted.

Implementation of response:

In its report, IIS notes the key privacy risks associated with the PPS Register and reports that much of the potential adverse privacy impact initially identified has been mitigated in the PPS Bill (see page 4 of Attachment C).

Recommendation 4

1.19 Liberal senators recommend that:

- (a) a Privacy Impact Assessment be undertaken by a person or organisation that is independent from the government and who has experience in undertaking such assessments; and
- (b) the Privacy Impact Assessment and the government's response to it should be tabled in Parliament within 2 months of the date the Assessment is completed.

Government response:

Accepted in part. A Privacy Impact Assessment will be undertaken by an appropriately qualified independent person or organisation. The assessment will be made public within two months of its completion.

Implementation of response:

See majority recommendation 5.

Recommendation 5

1.20 Liberal senators recommend that any issues considered in accordance with majority recommendation 6 and the government's response to them should be tabled in a report to Parliament within 2 months of the date that the Privacy Impact Assessment is completed.

Government response:

Accepted in part. The Privacy Impact Assessment will consider all issues raised by the Office of the Privacy Commissioner in its submission to the Committee. The assessment will be published on the Department's website within two months of its completion.

Implementation of response:

See majority recommendations 5 and 6.

Recommendation 6

1.27 Liberal senators recommend that the requirement to act in a *commercially reasonable manner* be removed from proposed section 235 of the bill and be excluded from any future version of the reform.

Government response:

Accepted. The Government acknowledges the concerns expressed in the report about the operation of section 235 of the Bill as originally drafted. This Bill will be amended to make clear that the duty to act in a reasonably commercial manner applies only in relation to Chapter 4 of the Bill concerning the enforcement of security interests. The duty to act in a reasonably commercial manner will not apply to the extent that the parties have contracted out of the enforcement provisions of the Bill under section 154 of the Bill.

Implementation of response:

See majority recommendation 7.

Recommendation 7

1.30 Liberal senators recommend that the government further considers the content of international conflict of laws provisions and incorporate into the bill either:

- (a) a simple and effective model of conflict of laws provisions based on an existing international model; or
- (b) the conflict of laws provisions at Appendix A to the Department's submission.

Government response:

Accepted. The Government will include conflict of laws provisions in the Bill based on the provisions at Appendix A to the Department's submission to the Committee (the revised commentary to the Bill).

Implementation of response:

See majority recommendation 8.

Recommendation 8

1.33 Liberal senators recommend that the government strengthen the proposed enforcement provisions with a focus on:

- (a) comprehensive and effective sanctions for improper use of the register;
- (b) ensuring the registrar's ability to inquire into suspect activity; and
- (c) the availability of civil and criminal action with appropriate penalties.

Government response:

Accepted. The Government will amend the Bill to provide enhanced sanctions for improper use of the register and to ensure the registrar can monitor and investigate suspicious register activity. Further consideration will be given to appropriate sanctions for misusing the register which may include civil and criminal penalties.

Implementation of response:

See majority recommendation 9.

Recommendation 9

1.36 Liberal senators recommend that the government should identify any outstanding concerns about the intellectual property provisions of the draft bill and should outline the concerns and its response in its report to the Senate (as per Liberal senators' recommendation 1(e)(ii)).

Government response:

Not accepted. See response to Liberal Senators' recommendation 1. However, the Government will seek input from stakeholders about the intellectual property provisions in the Bill to address any outstanding concerns about the provisions.

Implementation of response:

The substantive provisions relating to security interests in intellectual property have been co-located in Part 3.5 of the Bill (comprising clauses 104–106). The general effect of these provision is that if an obligation is secured by both goods and intellectual property rights, so that enforcement of the security interest in the goods necessarily involves an exercise of the intellectual property rights, then:

- (a) the Act would apply in the same way to both the goods and the intellectual property rights;
- (b) a registration that perfects the security interest in the goods will also perfect the security interest in the intellectual property, and a description of the goods in the security agreement would be deemed to include a description of the intellectual property.

Security interests in intellectual property would be governed by the law that applies to the intellectual property (clause 239(3)).